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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

R. ALEXANDER ACOSTA, Secretary of
Labor, United States Department of Labor,

Case No.: 2:17-CV-00961-JLR

Plaintiff,

v.

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

HOA SALON ROOSEVELT, INC., a
Washington corporation, **HOA SALON
BALLARD, INC.**, a Washington corporation,
THUY MICHELLE NGUYEN PRAVITZ, an
individual and managing agent of the
Corporate Defendants, **ERIC PRAVITZ**, an
individual and managing agent of the
Corporate Defendants,

Defendants.

1 The Court should deny Defendants' motion for partial summary judgment
2 because Defendants willfully violated the FLSA. Defendants' own statements,
3 testimony, and documents will prove that they willfully failed to pay overtime and
4 maintain records of hours and pay as required by the FLSA.¹ Defendants'
5 reliance on the 2013 investigation in its motion is like putting blinders on a horse,
6 ignoring what constitutes willfulness under the FLSA and ignoring its own failures
7 to comply following that investigation.

8 **I. FACTUAL BACKGROUND**

9 Hoa Salon is an award-winning salon and was ranked in the top 10 for
10 their services in Seattle in 2017.² Defendants built their business and reputation
11 on the service provided by its hard-working nail technicians. Defendants Eric
12 Pravitz and Michelle Pravitz both studied business and had both worked in many
13 industries when they decided to go into the nail salon business.³ They employed
14 nail technicians and receptionists at their salons, many of whom did not read or
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16 ¹ Defendants' motion outlines issues it has with the Secretary's disclosures and discovery
17 responses that are irrelevant to the question of whether Defendants' violations of the FLSA were
18 willful. Defendants' Motion for Partial Summary Judgment, Dkt. 30 (Defendants' Motion for Partial
Summary Judgment at pp. 4-6). The Secretary does not intend to call former Wage and Hour
Investigator Sherrie Chan in the trial in this matter and does not need her testimony to prove that
Defendants' violations were willful.

19 ² Declaration of Abigail G. Daquiz (Daquiz Decl.), ¶ 2, Exhibit 1 (Seattle's A-List Award,
ranking Hoa Salon #4 of 153 salons in Seattle in 2017).

20 ³ Defendant Eric Pravitz has earned a Bachelor's degree from University of La Verne in
California in Business Administration. Daquiz Decl., ¶ 3, Ex. 2 (Deposition of Mr. Eric Pravitz at
7:7-9; 10:12-24). Defendant Michelle Pravitz graduated from high school in Vietnam and
attended two years of college in New Jersey at Glassboro State College in Cherry Hill, NJ
where she took business classes. Daquiz Decl., ¶ 4, Ex. 3 (Deposition of Mrs. Michelle Pravitz
at 7:13-8:20).

1 write in English and would rely on family members to translate for them.⁴ Mr.
2 Pravitz testified that when he and his wife opened their first nail salon, Hoa Salon
3 Roosevelt, Inc., they were trying to change the practice they saw in other nail
4 salons where employees were accustomed to being paid in irregular forms of
5 payment with a mix of payroll checks and cash payments.⁵

6 Mr. and Mrs. Pravitz knew that there were overlapping rules and
7 regulations governing employers. For example, Mr. Pravitz testified that he
8 wanted to make sure that they were paying payroll taxes and that the employees
9 were paying towards Social Security.⁶ Mr. Pravitz knew about minimum wage
10 rules and other rules employers had to follow because they were widely available
11 through the media.⁷ Indeed, Mr. Pravitz drafted employment letters outlining the
12 terms of employment for the Hoa Salon employees outlining hourly rates, how
13 overtime would be paid at 1.5 times the employee's hourly rate, and information
14 about employee schedules and breaks.⁸

15 Defendants Hoa Salon Roosevelt and Mr. and Mrs. Pravitz were
16 investigated by the Department of Labor in 2013 as part of the agency's
17 emphasis program on nail salons.⁹ This investigation covered only Defendant
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19 ⁴ Daquiz Decl., Ex. 2 (E. Pravitz Dep. at 49:11-19).

20 ⁵ *Id.* (E. Pravitz Dep. at 17:3-20).

21 ⁶ *Id.*

22 ⁷ *Id.* (E. Pravitz Dep. at 58:2-10).

23 ⁸ These are all of the employment letters produced by Defendants from the time period
prior to 2018 (when a new time card system was instituted). Daquiz Decl., ¶ 5 and Exhibit 4.

24 ⁹ Declaration of Sherrie Chan, Nov. 29, 2018 (Chan Decl.) ¶ 2.

1 Hoa Salon Roosevelt, Inc.¹⁰ The Wage and Hour Investigator conducting the
2 investigation was Sherrie Chan who no longer works for the agency.¹¹ This
3 investigation closed without penalties being issued against because the
4 underpayments uncovered were paid immediately by the employer.¹²

5 However, in the course of coming to agreement about resolving the
6 underpayments, WHI Chan advised the Defendants their payroll practices were
7 in violation of the recordkeeping provisions of the Fair Labor Standards Act.¹³
8 First, Defendants simply failed to maintain employee time records as required by
9 the Act and 29 C.F.R. §§ 516.2, 516.6.¹⁴ Second, Defendants' recording of
10 wages paid on a salary basis in semi-monthly payments violated the requirement
11 to maintain a record of hours on a workweek basis.¹⁵ In 2013, Defendants paid
12 their employees twice a month on the 5th and 20th of each month, as described in
13 their employment letters.¹⁶ Employees were paid on a salary system and
14 employees were paid 1.5 times the base hourly rate for hours in excess of 87 for
15 a semi-monthly period, instead of being paid for hours worked in excess of 40 in
16 a workweek—making it difficult to tell whether or not employees were getting
17 paid properly for overtime.¹⁷ Defendants showed these extra payments in a

10 *Id.*

¹¹ *Id.*, ¶¶ 1, 2.

12 *Id.*, ¶ 5.

13 *Id.*, ¶¶ 4-6.

¹⁴ *Id.*, ¶ 4.

15 *Id.*, ¶ 5.

¹⁶ See, Chan Decl., ¶¶ 4-6; and Daquiz Decl., Ex. 4 (Employee Offer Letters)

¹⁷ Chan Decl., ¶ 5.

1 category in their payroll system labeled “Bonus” that contained payments for
2 performance bonuses and payments for paid holidays but failed to include the
3 number of hours worked used to arrive at those payments.¹⁸ Mr. Pravitz states in
4 his declaration that the Wage and Hour Investigator told him that their payroll
5 recordkeeping practices should be changed from classifying all employees as
6 “salaried” to classify those who were paid by the hour and for overtime as
7 “hourly” employees.¹⁹

8 At the conclusion of the investigation, WHI Chan provided Mr. and Mrs.
9 Pravitz with a briefing of what the FLSA and related regulations required and
10 provided the employer with the following guidance documents:

- 11 • Fact Sheet 44, Visits to Employers
- 12 • WH 1088, Fair Labor Standards Act Poster
- 13 • WH 1261, Regulations at Title 29 Part 516, Recordkeeping
- 14 • WH 1262, Regulations at Title 9 Part 778, Overtime Compensation
- 15 • WH 1297, Employment Relationship Under the Fair Labor Standards
- 16 • WH 1281, Regulations at Title 29 Part 541, Exemptions to the Fair
- 17 • Labor Standards Act
- 18 • WH 1282, Handy Reference Guide to the Fair Labor Standards Act
- 19 • WH 1312, Regulations at Title 29 Part 785, Hours Worked
- 20 • WH 1318, U.S. Code, Title 29, Chapter 8, Fair Labor Standards Act
- 21 • WH 1330, Child Labor Provision for Non-Agricultural Occupations
- 22 • under Fair Labor Standards Act
- 23 • WH 1467, Regulations at Title 29, Part 578, Minimum Wage and
- 24 • Overtime Violations: Civil Money Penalties

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1 These publications contain the text of the Fair Labor Standards Act, the
2 regulations regarding recordkeeping, overtime, and other agency guidance about
3 employers' responsibilities under the Act.²⁰ The investigation concluded in
4 August of 2013.

5 Despite knowing in 2013 that their payroll system did not comply with the
6 FLSA's requirements, it was not until April 1, 2015, that Defendants finally
7 changed their payroll system to reflect hourly pay rather than payment for an
8 annual salary.²¹ Then, more than a year later, Defendants made another change.
9 On June 1, 2016, Defendants added an Overtime category to the payroll system.
10 This was the first time that employees' pay records identified overtime wages
11 separate from other "Bonus" payments that included paid holidays and
12 performance bonuses.²² Mr. Pravitz testified that this change was made after
13 some difficulty with his accountant who did not give him permissions in the
14 program to make the change.²³

15 In October 2016, the Wage and Hour Division investigated Defendants'
16 employment practices at three related Hoa Salons located in the Roosevelt,
17 Ballard, and Madison Valley neighborhoods.²⁴ As an initial matter, it was clear
18 that Defendants' recordkeeping practices had not improved as they were still
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20 Chan Decl., ¶ 7, Exhibits A-K.

21 Daquiz Decl., ¶ 6, 7; Exhibits 5 and 6.

22 *Id.*

23 *Id.*, Ex. 2 (E. Pravitz Dep. at 54:6-17).

24 Declaration of Katherine Walum, ¶¶ 2-3.

1 missing time records and continued to fail to account for hours worked on a
2 workweek basis.²⁵

3 Mr. and Mrs. Pravitz met with Wage and Hour Investigator Katherine
4 Walum and during that meeting Defendants described their pay practices.²⁶
5 Defendants acknowledged that they required workers to be at work from 9:30 AM
6 to 7:15 PM Mondays through Saturdays (and 10:30 AM to 5:15 PM on Sundays),
7 that they pay the workers for 9 hours of work, and that they always deduct 30
8 minutes for lunch. Defendants described that the employees are assigned clients
9 on a “turn-based” system and that employees can choose to skip their turn with a
10 client in order to take a break—and they readily admitted that they did not record
11 breaks on the time sheets.²⁷ They described how they paid overtime for hours
12 worked over 87 hours in the semi-monthly pay period.²⁸ Defendants did not
13 maintain any of the time entry records for either Hoa Salon Ballard or Hoa Salon
14 Roosevelt and only presented WHI Walum with worksheets of total number of
15 hours per day that they used to run their payroll for Hoa Salon Roosevelt.²⁹
16 Defendants only maintained and produced a few months of their time record
17 worksheets for Hoa Salon Ballard.³⁰

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20 ²⁵ *Id.*, ¶¶ 2, 4.

21 ²⁶ *Id.*, ¶¶ 2, 3.

22 ²⁷ *Id.*, ¶ 2, Exhibit 1.

23 ²⁸ *Id.*

24 ²⁹ *Id.*, ¶ 4.

25 ³⁰ *Id.*

1 Beginning on January 1, 2017, Defendants made another change to their
2 payroll practices. They began to calculate employee work hours using a 7-day
3 pay period, Sunday through Saturday and calculated overtime pay for the hours
4 worked in excess of 40 hours during that 7-day pay period at 1.5 times the
5 regular pay rate.³¹

6 **II. ARGUMENT**

7 **A. Legal Standard**

8 The Court must deny summary judgment when the nonmoving party
9 presents specific facts showing remaining genuine issues of material fact for
10 trial.³² “[T]he judge must assume the truth of the evidence set forth by the
11 nonmoving party.”³³ The court must view the evidence in the light most favorable
12 to the non-moving party and draw all reasonable inferences in its favor.³⁴ On a
13 motion for summary judgment the court “does not make credibility determinations
14 or weigh conflicting evidence.”³⁵ Defendants’ statements, testimony, and their
15 recordkeeping practices raises genuine issues of material fact sufficient to defeat
16 summary judgment.

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³¹ Walum Decl., ¶ 5; Daquiz Decl., ¶ 6, 7; Exhibits 5 and 6.

21 ³² *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986).

22 ³³ *Leslie v. Grupo ICA*, 198 F.3d 1152, 1158-59 (9th Cir. 1999) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

23 ³⁴ *Smith v. Clark Cnty. School Dist.*, 727 F.3d 950, 954 (9th Cir. 2013).

24 ³⁵ *Porter v. Cal. Dep’t of Corrs.*, 419 F.3d 885, 891 (9th Cir. 2005).

1 **B. Defendants willfully violated Section 207 of the FLSA and**
2 **therefore a three year statute of limitations applies.**

3 Defendants cannot prevail on summary judgment on the question of
4 willfulness because they showed reckless disregard when setting up their payroll
5 processes. When employers willfully violate the FLSA, as Defendants have, a
6 three year, rather than two year statute of limitations applies.³⁶ A violation of the
7 FLSA is willful if the employer either knew or showed reckless disregard for the
8 matter of whether its conduct was prohibited by the FLSA.³⁷ Further, an employer
9 need not act knowingly to willfully violate the FLSA—an employer's reckless
10 disregard for the matter of whether its conduct was prohibited by the FLSA is
11 sufficient to find an employer acted willfully.³⁸ A violation is willful where an
12 employer disregarded the very "possibility" that it was violating the FLSA.³⁹
13 Indeed, in the Ninth Circuit, an employer's violation of the FLSA is "willful" when it
14 is "on notice of its FLSA requirements, yet [takes] no affirmative action to assure
15 compliance with them."⁴⁰

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18 ³⁶ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003); 29 U.S.C. § 255.

19 ³⁷ *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

20 ³⁸ *Flores v. City of San Gabriel*, 824 F.3d 890, 906 (9th Cir. 2016), cert. denied sub nom. *City of San Gabriel, Cal. v. Flores*, 137 S. Ct. 2117 (2017).

21 ³⁹ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003) citing *Herman v. RSR Sec Servs. Ltd.*, 172, F.3d 132, 141 (2nd Cir. 1999).

22 ⁴⁰ *Flores*, 824 F.3d at 906-907(citing *Alvarez*, 339 F.3d at 909)(finding willfulness where the City failed to investigate whether its exclusion of cash-in-lieu of benefits payments from the regular rate of pay complied with the FLSA at any time following its initial determination that the payments constituted a benefit).

1 Not only are there material facts in dispute, Mr. Pravitz' testimony makes it
2 clear that he was aware of the FLSA's overtime and recordkeeping requirements
3 and ignored them, rendering Defendants' conduct willful. From the opening of
4 Hoa Salon Roosevelt, Defendants acknowledged the importance of keeping pay
5 records and accounting for overtime.⁴¹ Mr. Pravitz studied business
6 administration and he and his wife purportedly wanted to make sure that they
7 were in compliance with the rules governing employers. They put these rules in
8 writing to be shared with their employees in the form of employment letters so
9 that the workers would know what their rights and obligations were as employees
10 of Hoa Salon.⁴² And they set up a flawed system of paying overtime that failed to
11 comply with the FLSA, but acknowledges the requirement that overtime be paid
12 at a premium rate of 1.5 times their regular rate. Defendants told their employees
13 that they would get breaks as part of the work day⁴³—and then they routinely
14 deducted 30 minutes from their employees' hours each day without scheduling
15 breaks or requiring that the employees take their breaks. In fact, Defendants
16 state that employees could “skip their turn” to serve a client to take a break,
17 putting the responsibility of taking breaks (at the risk of missing their turn and
18 potential tip income) on the employees.⁴⁴

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21 ⁴¹ See, *supra*, pp. 2-3.

22 ⁴² *Id.*; Daquiz Decl., Ex. 4 (Employment Offer Letters).

⁴³ *Id.*

⁴⁴ Walum Decl., ¶ 2, Exhibit 1.

Notwithstanding Defendants' understanding of their obligations, they did not maintain the required time records, they did not record and maintain their payroll to show when their employees' incurred overtime in a workweek and whether or not that overtime was paid correctly, and they deducted 30 minutes from employees' hours, without regard for whether those employees were actually on break. These are willful violations of the FLSA and warrant extending the statute of limitations to a three-year period.

C. Following the 2013 Wage and Hour Investigation, Instead of Coming Into Compliance, Defendants Continued to Violate the FLSA.

An employer acts knowingly when it has knowledge of the FLSA's requirements, such as guidance from a prior investigation by the U.S. Department of Labor, and fails to comply.⁴⁵ Past investigations that resulted in only "warnings against further violations of the FLSA" followed by evidence that the employer's promises of future compliance had not been met is also sufficient to find willful violations.⁴⁶ Courts find past investigations probative of willfulness, even when those past investigations found non-willful violations that are different in kind from the current allegations.⁴⁷

⁴⁵ *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 919 (9th Cir. 2003); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 967 (6th Cir. 1991) (finding willfulness where defendant had actual knowledge of the FLSA's overtime requirements from a previous Department of Labor investigation and failed to comply).

⁴⁶ *Hodgson v. Cactus Craft of California*, 481 F.2d 464, 467 (9th Cir 1973).

⁴⁷ *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 919 (9th Cir. 2003) (prior FLSA violations, “even different in kind from the instant one and not found to be willful” is probative of finding willful violations in subsequent proceedings).

1 In August of 2013, Defendants had a meeting with WHI Chan where she
2 outlined the requirements of the FLSA's minimum wage, overtime and
3 recordkeeping provisions.⁴⁸ Further, she told them that there were records
4 missing and the records provided by the Defendants did not comply with the
5 FLSA's requirements making a review to determine compliance difficult.⁴⁹
6 Defendants failed to maintain and keep time records showing employees' start
7 and end times for the required two year period and Defendants organized the
8 employee pay records on a salary basis on a semi-monthly pay period, instead of
9 an hourly basis broken down into workweeks.⁵⁰ This made it difficult for
10 employees to know if they were being paid correctly and difficult for investigators
11 or auditors to determine compliance.⁵¹ Defendants represented that they would
12 make the corrections to their payroll records and come into compliance.⁵²

13 However, at the close of the 2013 investigation and contrary to the
14 implication in Defendants' declaration—Defendants did not make immediate
15 changes to their recordkeeping and payroll systems. Defendants changed their
16 categorization of employees from salaried to hourly on April 1, 2015—20 months
17 after the 2013 investigation.⁵³ Then, Defendants again waited until more than a
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19 ⁴⁸ See, *supra*, pp. 3-4.

20 ⁴⁹ *Id.*, and Chan Decl., ¶ 5.

21 ⁵⁰ Chan Decl., ¶¶ 5, 6.

22 ⁵¹ *Id.*

23 ⁵² *Id.*, ¶ 6; Dkt. 31, Declaration of Eric Pravitz in support of Defendants' Motion for Partial
Summary Judgment, at ¶ 5.

24 ⁵³ Daquiz Decl., ¶¶ 6, 7; Exhibits 5 and 6 (Interrogatory Responses from Defendants Hoa
Salon Roosevelt, Inc. and Hoa Salon Ballard, Inc.).

1 year later, on June 1, 2016, to add an Overtime category to the payroll system
2 and properly account for overtime payments separate from other “Bonus”
3 payments (including paid holidays and performance bonuses).⁵⁴ Mr. Pravitz
4 testified that he had been meaning to make this change, but difficultly with his
5 accountant delayed the implementation.⁵⁵ Finally, on January 1, 2017,
6 Defendants made another change to their payroll practices by calculating
7 employee work hours using a 7 day pay period, Sunday through Saturday and
8 calculated overtime pay for the hours worked in excess of 40 hours during that 7-
9 day pay period at 1.5 times the regular pay rate.⁵⁶ This change to a 7-day pay
10 period (instead of a semi-monthly pay period) coupled with the use of an
11 overtime category to reflect overtime payments (instead of a Bonus category as a
12 catch-all for overtime, holiday pay and performance bonuses) will now allow for
13 employees and auditors to review Defendants’ records to determine compliance
14 with the overtime rules.⁵⁷

15 The Defendants’ misapprehend the lessons that the 2013 audit should
16 have taught them. Instead of being a stamp of approval for their payroll practices,
17 it put Defendants on notice of the deficiencies of their payroll practices and
18 should have resulted in changes to ensure compliance in a timely manner.
19 Defendants’ slow-walk to compliance constitutes willful violations.

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21 ⁵⁴ *Id.*

22 ⁵⁵ Daquiz Decl., Ex. 2 (E. Pravitz Dep. at 54:6-17).

⁵⁶ Daquiz Decl., ¶¶ 6, 7; Exhibits 5 and 6.

⁵⁷ Walum Decl., ¶ 5.

III. CONCLUSION

The Court cannot ignore the Defendants' knowledge of the requirements of the FLSA and its failure to meet them. Defendants' own admissions and documents prove that Defendants knew and disregarded the requirements of the Act. The Court should deny Defendants motion and allow employees to recover the wages they earned for the entire three-year period.

Respectfully submitted this 3rd day of December, 2018.

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